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# ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2015

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2140029

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Tyler Kean

v.

Christine Kean

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Christine Kean

v.

Tyler Kean

Appeals from Baldwin Circuit Court  
(DR-10-95)

MOORE, Judge.

Tyler Kean ("the husband") appeals from a divorce judgment entered by the Baldwin Circuit Court ("the trial

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court"), arguing that the trial court erred in failing to include all the income of Christine Kean ("the wife") when calculating child support and in awarding the wife periodic alimony. The wife cross-appeals, arguing that the trial court erred in failing to include all the income of the husband when calculating child support.

#### Background

On February 10, 2010, the wife filed a complaint seeking a divorce from the husband. After protracted proceedings, the trial court entered a final judgment on September 4, 2014, which, among other things, awarded the wife sole physical custody of the parties' three minor children, awarded the wife \$1,250 per month in child support, and awarded the wife \$2,200 per month in periodic alimony. The husband timely appealed on October 14, 2014. The wife timely cross-appealed on October 16, 2014.

In its final judgment, the trial court explained that it had followed Rule 32, Ala. R. Jud. Admin., in computing its child-support award. The trial court determined that the husband was receiving \$80,000 per year in annual income and imputed monthly income of \$628 to the wife based on its

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finding that she could work 20 hours per week at minimum wage. The trial court did not explain how it calculated the periodic-alimony award.

### Analysis

#### I. Child Support

The husband argues that, in calculating child support, the trial court erred in failing to include the wife's trust income. The wife testified that she receives \$3,000 per month from a trust established by her father. Rule 32(B)(2)(a), Ala. R. Jud. Admin., expressly provides that "trust income" should be included in "gross income" when computing child support. In the forms used by the trial court to determine child support, the trial court did not include the wife's trust income. The wife concedes in her appellate brief that the trial court should have included the trust income.<sup>1</sup> Thus, we conclude that the trial court erred in failing to include the wife's trust income when calculating child support.

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<sup>1</sup>The wife asserts at one point in her brief, that the trial court speculated by imputing wage income of \$628 per month to her, but the wife does not develop that argument sufficiently to comply with Rule 28(a)(10), Ala. R. App. P., so we do not consider that argument further. See Board of Water & Sewer Comm'rs of City of Mobile v. Bill Harbert Constr. Co., 27 So. 3d 1223, 1261-62 (Ala. 2009).

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The wife complains that the \$80,000 in annual income the trial court attributed to the husband did not include expense reimbursements the husband received from the restaurant he operates as a sole proprietorship. Rule 32(B)(4), Ala. R. Jud. Admin., provides: "Expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business shall be counted as income if they are significant and reduce personal-living expenses." See also Rule 32(B)(3) (defining "self-employment income"). A certified public accountant retained by the wife testified that, based on a review of the financial records from the husband's restaurant generated between 2007 and 2012, the husband had received an average annual income from that business of \$174,245, which income included payments from the business to cover some of the parties' personal expenses. The accounting expert retained by the husband agreed that the husband had received \$174,425 per year as the wife's accountant had determined. The husband estimated that he earned only \$80,000 per year in gross income from the business, but he did not dispute that the business had paid additional personal expenses for him as the experts testified.

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At the close of the trial, the trial court informed the parties that it intended to use \$80,000 as the husband's gross income for child-support purposes. The wife's counsel noted that both experts had testified that the husband had actually received "\$176,000 a year" from the business. The trial court then stated:

"I'll allow that to come back up in [a] Motion to Alter, Amend or Vacate. I can't put my hands on any testimony that came out at this moment. That is what I have been looking at the past hour. I have cash flow. I don't have those specific connections. This Cash Flow does not indicate that. For right now ... this is what I'm calculating it on. \$80,000 a year ...."

The wife did not file a postjudgment motion, so the trial court did not have an opportunity to reconsider its ruling. However, the issue is properly before this court. See Rule 52(b), Ala. R. Civ. P.; and Weeks v. Herlong, 951 So. 2d 670 (Ala. 2006) (although trial court did not make written findings of fact in nonjury case, its statements from the bench at the conclusion of trial sufficiently set forth factual basis of judgment so that appellant was not required to file postjudgment motion in order to preserve sufficiency-of-evidence argument).

We agree with the wife that the trial court erred in failing to consider all the income the husband received from his business when determining child support. Therefore, we reverse that aspect of the judgment awarding child support and remand the cause for the trial court to redetermine the amount of child support in accordance with this opinion.

## II. Periodic Alimony

The husband argues that the trial court erred in awarding the wife any periodic alimony. The husband contends (1) that the wife did not show a need for support and (2) that the record shows that he does not have the ability to pay the wife the \$2,200 per month in periodic alimony as ordered by the trial court. In the judgment, the trial court simply awarded the wife \$2,200 per month in periodic alimony without making any findings of fact. At the close of the trial, the trial court addressed its award by saying:

"I am -- I am going to offset [the wife]'s expenses in the form of permanent periodic alimony, and that will be in the amount of \$2,200.00 a month. And that does not take into consideration the car payment. I pulled that out because that was testified to earlier. I had actually not included that. And that will be the total amount there."

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Those statements indicate that the trial court determined that the wife needed periodic alimony to pay her living expenses, except for her automobile payment, and that the trial court determined that an award of \$2,200 a month would be sufficient to meet those needs.<sup>2</sup> Thus, this court may review the evidence to determine if it sufficiently supports those findings. See Weeks, supra. The trial court, however, did not specifically find that the husband had the ability to meet those needs as well as the other obligations imposed on him in the divorce judgment. See Shewbart v. Shewbart, 64 So. 3d 1080, 1088 (Ala. Civ. App. 2010). The husband did not point out that omission to the trial court or otherwise argue that the evidence failed to support any implicit finding that he could afford to pay the periodic-alimony award. Thus, we

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<sup>2</sup>In its judgment, the trial court specifically stated that it intended to divide the marital property "in an equal, 50/50 basis." A trial court may order alimony in gross in order to effect an equitable property division, especially when liquidation of marital assets is not practicable. See Hager v. Hager, 293 Ala. 47, 54, 299 So. 2d 743, 749 (1974). In fact, in this case, the trial court did award the wife the sum of \$28,000 "representing property division," stating: "This amount is needed to be given to the [wife] to equalize value." That award is separate from the award of periodic alimony, which is the only alimony provision that this court has been asked to review.

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cannot consider any issue regarding the alleged inability of the husband to pay the periodic-alimony award, which the husband raises for the first time on appeal. See New Props., L.L.C. v. Stewart, 905 So. 2d 797, 801-02 (Ala. 2004) ("[I]n a nonjury case in which the trial court makes no specific findings of fact, a party must move for a new trial or otherwise properly raise before the trial court the question relating to the sufficiency or weight of the evidence in order to preserve that question for appellate review."). See also Cooper v. Cooper, 160 So. 3d 1232 (Ala. Civ. App. 2014); and Rieger v. Rieger, 147 So. 3d 421, 429 (Ala. Civ. App. 2013).

Periodic alimony is intended as income to be payable from one spouse to another to enable the recipient spouse, to the extent possible, to maintain his or her standard of living as it existed during the marriage, i.e., the "economic status quo." Orr v. Orr, 374 So. 2d 895, 897 (Ala. Civ. App. 1979). In order to obtain periodic alimony, a petitioning spouse must demonstrate "a need for continuing monetary support to sustain the former, marital standard of living that the responding spouse can and, under the circumstances, should meet." Shewbart, 64 So. 3d at 1087.

"A petitioning spouse proves a need for periodic alimony by showing that without such financial support he or she will be unable to maintain the parties' former marital lifestyle. As a necessary condition to an award of periodic alimony, a petitioning spouse should first establish the standard and mode of living of the parties during the marriage and the nature of the financial costs to the parties of maintaining that station in life. The petitioning spouse should then establish his or her inability to achieve that same standard of living through the use of his or her own individual assets, including his or her own separate estate, the marital property received as part of any settlement or property division, and his or her own wage-earning capacity, with the last factor taking into account the age, health, education, and work experience of the petitioning spouse as well as prevailing economic conditions, and any rehabilitative alimony or other benefits that will assist the petitioning spouse in obtaining and maintaining gainful employment. If the use of his or her assets and wage-earning capacity allows the petitioning spouse to routinely meet only part of the financial costs associated with maintaining the parties' former marital standard of living, the petitioning spouse has proven a need for additional support and maintenance that is measured by that shortfall."

Shewbart, 64 So. 3d at 1087-88 (citations omitted).

The wife submitted an exhibit itemizing her monthly expenses, which included costs associated with caring for the parties' children and which totaled approximately \$7,315 per month. The husband maintains that the cost of automobile payments, rent, and country-club membership dues, which were

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all included on the wife's exhibit, should not be considered because, he says, the evidence showed that the wife was no longer incurring those expenses at the time of the trial. However, the starting point in calculating periodic alimony is the financial costs of maintaining the marital standard of living, not the actual cost of the postmarital standard of living. See J.D.A. v. A.B.A., 142 So. 3d 603, 620-21 (Ala. Civ. App. 2013) (Moore, J., concurring in part, concurring in the result in part, and dissenting in part). Thus, in the absence of another objection from the husband, we consider \$7,315 per month to be the proven costs of the wife's marital standard of living.

The husband argues that the wife can satisfy her and the children's monthly financial needs through her trust income, her wage-earning capacity, child support, and the liquid assets that she obtained through the divorce judgment, which amount to approximately \$110,000. We disagree. Upon receipt of the trust income and the child support,<sup>3</sup> as well as

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<sup>3</sup>Ordinarily, we could not consider child support when determining the wife's need for periodic alimony. However, in this case, the wife included some of the costs of child care in her expense exhibit, so we consider that the child-support award will address those costs. However, we recognize that the trial court reasonably could have determined that the wife

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factoring in her wage-earning ability, the wife would still have a shortfall approximating \$2,200 per month. The wife could meet that shortfall by using the approximately \$110,000 she should receive from the property division, but, assuming she devoted all of that property settlement to maintain the marital standard of living, the wife, who was 39 years old at the time of the trial, would consume that entire amount in a little over four years and would still have a long life expectancy ahead of her. See Body v. Body, 47 Ala. App. 443, 256 So. 2d 184 (Ala. Civ. App. 1971) (where, without significant award of periodic alimony, former wife would be forced to deplete her share of marital estate in a short time, leaving her no estate and no long-term means of support, trial court erred in awarding former wife only \$1 per month in periodic alimony).

"Periodic alimony is completely a creature of legislative design." J.L.M. v. S.A.K., 18 So. 3d 384, 390 (Ala. Civ. App.

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did not list all the costs for child care and that some portion of the child support awarded would be devoted to those unlisted costs, so we do not consider the entirety of the child-support award when assessing the economic needs of the wife.

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2008). Section 30-2-51(a), Ala. Code 1975, the operative statute in this case, provides, in part:

"If either spouse has no separate estate or if it is insufficient for the maintenance of a spouse, the judge, upon granting a divorce, at his or her discretion, may order to a spouse an allowance out of the estate of the other spouse, taking into consideration the value thereof and the condition of the spouse's family."

In Steiner v. Steiner, 254 Ala. 260, 48 So. 2d 184 (1950), Mr. Steiner argued that Mrs. Steiner, as the owner of an automobile, various stocks, jewelry, insurance, and other financial assets, could support herself using those assets and, thus, that her separate estate was not "insufficient for [her] maintenance" within the meaning of a predecessor statute to § 30-2-51(a). Our supreme court disagreed, stating:

"Without question [Mrs.] Steiner has a separate estate. Has she an estate sufficient for her maintenance? What is the proper construction to be placed on the words 'insufficient for her maintenance'?"

"We cannot agree with the interpretation of [Mr. Steiner]. Tendencies of evidence in this case show that such estate as [Mrs. Steiner] may own is an unproductive estate at this time. It does not produce an income on which she can live and certainly does not produce an income on which she can live in the manner to which she has been accustomed. If an estate produces no income or an income on which the wife cannot subsist in the manner to which she is accustomed, then we consider that her separate estate is insufficient for her

maintenance. Under the circumstances here shown a wife should not be deprived of alimony under the foregoing statute because by selling the corpus of her estate she may thereby maintain herself. The statute does not contemplate that a wife shall take her jewels for example and sell or pawn them in order to live. This would be a harsh interpretation of the statute with which we cannot agree.

"We are impressed with the construction placed on the Kentucky statute by the courts of that state. The statute is that, 'If the wife does not have sufficient estate of her own she may, on a divorce obtained by her, have such allowance out of [the estate] of her husband as the court considers equitable'. [Ky. Rev. Stat.] 403.060. The court said: 'The interpretation of "sufficient estate of her own" is that it shall be of such character and amount as will yield income or profits sufficient for her comfortable maintenance in a style suitable to her social standing. What her standard of living would have been had she remained the wife of the defendant is an important consideration. Kelly v. Kelly, 183 Ky. 172, 209 S.W. 335 [(1919)]. The statute does not contemplate that no allowance shall be made out of the husband's estate if the wife could maintain herself by consuming her principal....' Barnett v. Barnett, 292 Ky. 840, 168 S.W.2d 17, 18 [(1942)]."

254 Ala. at 265-66, 48 So. 2d at 188-89.

Unlike in Steiner, the property awarded to the wife in this case constitutes \$110,000 in liquid assets to which the wife should have immediate access; however, the principle from Steiner remains the same. The wife should not be compelled to consume the principal of her property-distribution award in order to maintain the lifestyle to which she had become

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accustomed during the marriage. See Wells v. Wells, 366 So. 2d 728 (Ala. Civ. App. 1979) (wife with substantial liquid assets that produced income sufficient to meet some financial needs of wife was not required to reduce the corpus of her separate estate in order to meet other financial costs of marital standard of living). In Shewbart, this court stated that a trial court must consider the ability of a petitioning spouse to "to achieve that [marital] standard of living through the use of his or her own individual assets, including ... the marital property received as part of any settlement or property division ...." 64 So. 3d at 1088 (emphasis added). We did not by that statement intend to depart from the holding in Steiner. Arguably, according to Steiner and Shewbart, the trial court could have considered interest income resulting from the investment of the funds derived from the liquid assets in quantifying the financial need of the wife, see also Body, 47 Ala. App. at 448, 256 So. 2d at 188 (considering interest income from savings account when determining financial needs of former wife); and Wells, supra, but neither party presented any evidence in that regard.

We conclude that the trial court acted within its discretion in awarding the wife \$2,200 per month in periodic

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alimony. See Payne v. Payne, 48 So. 3d 651, 655-56 (Ala. Civ. App. 2010). Thus, we affirm that part of the judgment awarding the wife periodic alimony.

APPEAL -- AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Pittman, Thomas, and Donaldson, JJ., concur.

Thompson, P.J., concurs in part and concurs in the result in part, with writing.

CROSS-APPEAL -- REVERSED AND REMANDED WITH INSTRUCTIONS.

Pittman, Thomas, and Donaldson, JJ., concur.

Thompson, P.J., concurs in the result, with writing.

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THOMPSON, Presiding Judge, concurring in part and concurring in the result in part as to the appeal and concurring in the result as to the cross-appeal.

With regard to the issue of child support, I agree that the trial court erred in failing to consider the income of Christine Kean ("the wife") from her trust as a component of her gross income for the purpose of calculating child support. For the purposes of calculating child support, a parent's "gross income"

"includes income from any source, and includes, but is not limited to, salaries, wages, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits, workers' compensation benefits, unemployment-insurance benefits, disability-insurance benefits, gifts, prizes, and preexisting periodic alimony."

Rule 32(B)(2)(a), Ala. R. Jud. Admin.

I also agree with the conclusion in the main opinion that, given the evidence presented to it, the trial court erred in determining the gross income of Tyler Kean ("the husband") for the purpose of calculating child support. The record indicates that the husband has both self-employment income and "other income," as those terms are defined under the Rule 32 child-support guidelines. See Rule 32(B)(3) and Rule 32(B)(4). The trial court has no discretion that would

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allow it to ignore those sources of income. Massey v. Massey, 706 So. 2d 1272, 1274 (Ala. Civ. App. 1997).

The determination of the amount of the husband's gross income is within the discretion of the trial court. Hall v. Hubbard, 697 So. 2d 486, 488 (Ala. Civ. App. 1997). The amount of the husband's income is not undisputed; the husband contended that the full amount of income as determined by the wife's expert should not be attributed to him. Although the application of the Rule 32 child-support guidelines is mandatory, matters concerning child support are still within the discretion of the trial court. Hamilton v. Hamilton, 647 So. 2d 756, 758 (Ala. Civ. App. 1994); Smith v. Smith, 587 So. 2d 1217, 1218 (Ala. Civ. App. 1991). "The trial court is not bound by the income figures advanced by the parties, and it has discretion in determining a parent's gross income." Morgan v. Morgan, [Ms. 2120101, July 11, 2014] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Civ. App. 2014), writ quashed, [Ms. 1131206, June 5, 2015] \_\_\_ So. 3d \_\_\_ (Ala. 2015). See also Knight v. Knight, 53 So. 3d 942, 956 (Ala. Civ. App. 2010) (holding that the father had failed to demonstrate that the trial court abused its discretion in determining the amount of his income); Hood v. Hood, 23 So. 3d 1160, 1165 (Ala. Civ. App.

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2009) ("[T]he amount of the father's gross income under Rule 32 is a matter to be determined by the trier of fact."); and Davidson v. Davidson, 643 So. 2d 1001, 1004 (Ala. Civ. App. 1994) (holding that "the trial court was within its discretion to determine the monthly gross income of the parties" for the purposes of determining child support under the Rule 32 guidelines).

Therefore, although I do not agree with all the reasoning in the main opinion leading to this result, I concur in the result to reverse the trial court's judgment as to child support and to remand the matter to the trial court for a redetermination of child support after determining the husband's income from all sources and considering the wife's trust income. See Wellborn v. Wellborn, 100 So. 3d 1122, 1128 (Ala. Civ. App. 2012) (reversing a child-support determination when the trial court had failed to consider all sources of income and remanding the matter to the trial court to redetermine child support by including those sources of income); Bushnell v. Bushnell, 713 So. 2d 962, 966 (Ala. Civ. App. 1997) (reversing the judgment and remanding the cause for the trial court to recalculate child support by including all sources of income in determining the father's gross income);

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and Spillers v. Spillers, 707 So. 2d 256, 258-59 (Ala. Civ. App. 1997) (reversing the judgment and remanding the cause for the trial court to recalculate child support by including other sources of income in the determination of the father's gross income); see also Lightel v. Myers, 791 So. 2d 955, 961 (Ala. Civ. App. 2000) ("If the trial court determines that the application of the Child Support Guidelines is unjust or inequitable and elects to deviate from those guidelines in establishing the father's support obligation, it must make those findings required by Rule 32(A)(ii), Ala. R. Jud. Admin.").

I also concur in the result reached by the main opinion with regard to the issue of the alimony award. As the wife points out in her appellate brief, the issues of alimony and property division are interrelated and must be considered together. Albertson v. Albertson, 678 So. 2d 118, 120 (Ala. Civ. App. 1995). Our court has explained:

"This court must consider the issues of property division and alimony together when reviewing the decision of the trial court. Albertson v. Albertson, 678 So. 2d 118, 120 (Ala. Civ. App. 1995). '[T]here is no rigid standard or mathematical formula on which a trial court must base its determination of alimony and the division of marital assets.' Yohey v. Yohey, 890 So. 2d 160,

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164 (Ala. Civ. App. 2004). In Lackey v. Lackey, 18 So. 3d 393 (Ala. Civ. App. 2009), this court stated:

""When dividing marital property and determining a party's need for alimony, a trial court should consider several factors, including "the length of the marriage, the age and health of the parties, the future employment prospects of the parties, the source, value, and type of property owned, and the standard of living to which the parties have become accustomed during the marriage."" Ex parte Elliott, 782 So. 2d 308 (Ala. 2000) (quoting Nowell v. Nowell, 474 So. 2d 1128, 1129 (Ala. Civ. App. 1985)) (footnote omitted). In addition, the trial court may also consider the conduct of the parties with regard to the breakdown of the marriage.""

"Lackey, 18 So. 3d at 401 (quoting Baggett v. Baggett, 855 So. 2d 556, 559 (Ala. Civ. App. 2003))."

Shewbart v. Shewbart, 19 So. 3d 223, 231 (Ala. Civ. App. 2009).

The wife argues that the trial court exceeded its discretion in dividing the marital property. According to both the main opinion and the husband's appellate brief, the wife was awarded approximately \$110,000 plus her vehicle in the property division. The husband received the a boat valued at \$24,000, his vehicle, and the business. The husband contends the business has a "a fair market value of \$231,000." The wife presented evidence, however, indicating that the

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business was worth \$794,000, and she argued before the trial court that, under Alabama law, her valuation method was more appropriate than that utilized by the husband's expert, which focused on the value of the business if it was sold.<sup>4</sup> In Alabama, for purposes of valuing a family business in a divorce action, the business should be valued at its fair value, as opposed to its fair market value, when there is no evidence that the business is going to be sold as a result of the divorce action. See Grelier v. Grelier, 44 So. 3d 1092, 1096-98 (Ala. Civ. App. 2009) (discussing the various valuation methods); Ex parte Hartley, 50 So. 3d 1102, 1106 (Ala. Civ. App. 2010) ("[W]e hold that because the crucial inquiry to be undertaken by a trial court in a divorce action is to determine the fair value of the parties' assets rather

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<sup>4</sup>The husband's expert testified that the business was worth approximately \$330,000, and the wife's expert witness valued the business at \$794,000. The difference in that calculation was attributable, in part, to the husband's expert's factoring in a \$75,000 manager's salary for the business; in other words, he valued the business as if a purchaser purchased the business but hired a manager to run it, which would reduce the \$174,245 in cash flow by \$75,000. In this case, however, the husband manages the business, and, therefore, does not have the expense of paying a manager. The husband's expert agreed that, in determining the valuation of the business, the fact that the husband intended to keep operating the business affected its value, although he did not value the business with that contingency in mind.

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than to adhere in all cases to their 'fair market value,'" discovery concerning fair value is within the scope of Rule 26(b)(1), Ala. R. Civ. P.); and Wilson v. Wilson, 93 So. 3d 122, 127 (Ala. Civ. App. 2001) ("This court has explained that a trial court valuing a closely held business in the context of a divorce is not to determine the 'fair market value' of the entity but, instead, is to determine the 'fair value' of the entity.").

Thus, given the argument the wife made to the trial court concerning the value of the business awarded to the husband, the trial court could reasonably have concluded that the award of alimony offset a property division that greatly favored the husband.<sup>5</sup> Further, the evidence supports a conclusion that the husband's conduct caused the breakdown of the parties' 17-year marriage. In addition, the parties' oldest child has special needs. The evidence indicates that that child requires full-time care, which the wife provides, and that he will continue to need such care for the remainder of his

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<sup>5</sup>The husband was also ordered to pay some of the parties' debts and an income-tax arrearage for taxes not paid on the business. Even considering those payments, however, I conclude that the property division and the alimony award are equitable, given the factors set forth in Shewbart v. Shewbart, supra.

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life.<sup>6</sup> Thus, the wife's future employment prospects are limited by her need to care for the parties' oldest child. A property division and an alimony award are required to be equitable, and a determination of what is equitable under the facts of a particular case rests within the sound discretion of the trial court. Payne v. Payne, 48 So. 3d 651, 655-56 (Ala. Civ. App. 2010) (citing Sumerlin v. Sumerlin, 964 So. 2d 47, 50 (Ala. Civ. App. 2007)). Given the totality of the evidence in the record, and reviewing both the property division and the alimony award as this court is required to do, I conclude that the trial court did not abuse its discretion in fashioning the property division and the alimony award in this case. Accordingly, I concur in the result in the main opinion's decision to affirm the property division and the alimony award.

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<sup>6</sup>At the conclusion of the hearing in this matter, the trial court noted that it was difficult to analyze some of the wife's budget because of the special needs of the parties' oldest child. The trial court concluded that it could not consider the costs of child care for the special-needs child in the determination of child support because the wife was not employed outside the home. The trial court noted, however, that the wife would sometimes need assistance in caring for the special-needs child so that she could meet the needs of the parties' other two children.